



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

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November 21, 2012

**MEMORANDUM**

**SUBJECT:** Utah Draft 401 Water Quality Certification regulation comments

**FROM:** Julia McCarthy

**TO:** Bill Damery

Thank you for allowing us the opportunity to review and provide feedback on the Utah Division of Environmental Quality's (UDEQ)'s draft Clean Water Act (CWA) Section 401 Water Quality Certification (certification) rules. The proposed draft rules are clearly written and provide the regulated community with a concise outline of the application and decision process necessary to obtain a certification. In particular, the rules clearly define a complete application and allow flexibility for the UDEQ to require additional information. They also clearly lay out that denial without prejudice will occur if the application package / requested information is not provided.

It would be useful for UDEQ to consider drafting implementation guidelines to ensure consistency and efficiency in the decision-making process, as well as in the development of special conditions associated with certification. In particular, this is useful in wetlands where no specific water quality standards (WQS) exist, and for resource attributes that only have non-numeric standards. A detailed implemental plan can serve to address numerical and narrative WQS, including biological and habitat indicators, free-from toxics standards, non-point source discharges, and anti-degradation elements of the Utah WQS. It can also help to clarify how the information required in the application will inform a certification decision. This is especially true for physical (habitat), chemical and biological parameters. We would recommend UDEQ consider incorporating language in the rules requiring the development implementation guidance, similar to the language included in UDEQ's WQS Antidegradation Policy. We have included, as an attachment to this memo, the State of Colorado's 401 certification Rationale form to provide UDEQ with an example framework for standardizing the review and justification of 401 certifications.

We have the following additional suggestions to consider before moving forward to the public commenting process:

R317-15-3:

- The examples of federal permits or licenses could be expanded to include the following: Rivers and Harbors Act Section 10, Nuclear Regulatory Act and other federal permits. Because there are other federal permit that could lead to a discharge to Waters of the U.S. and federal courts have not agreed on the need for certification of some federal permits, UDEQ may wish to leave the reference to "other federal permits" ambiguous.

#### R317-15-4:

- Has UDEQ considered developing a joint application for related permits? A methodology or joint application system to ensure permit compatibility could be developed with the Corps of Engineers (CWA Section 404, RHA Section 10); Utah Water Rights Division (Stream Alteration R655-13 Permit); and local governments that have ordinances, including floodplain ordinances and conservation district ordinances. One example of close coordination of related aquatic permits is the State of Montana. Please see the website for additional information. <http://dnrc.mt.gov/Permits/StreamPermitting/JointApplication.asp>
- 4.1: We suggest adding a section that requests, if applicable, a description of the proposed mitigation measures to offset the impacts associated with the proposed discharge.
- 4.1(6): This section could be expanded to include a description of the aquatic impacts anticipated from the proposed project.
- 4.1(11): This section could also include a reference to requirements to protect state species of concern, especially where these species of concern relate directly to water quality goals. Additionally, it may be useful to provide additional clarity or examples of what information is expected under this section.
- 4.1(12): If this information will be utilized to protect aquatic life, would it also be useful to have the applicant provide information on the timing of various life history events for resident game fish native fish and aquatic life?
- 4.6: It would be useful to include a reference to the statute or other relevant authority that supports fees, and also possibly a brief description of the fee structure (e.g., is it a flat fee for all applications, or does the fee vary by project size).

#### R317-15-5

- 5.4: When a joint public notice and comment period occurs, will the UDEQ or the Corps determine the public notice length? Also, where a public notice is issued jointly, will the State publish the public notice independently of the Corps, consistent with Section 5.5?

#### R317-15-6

- We suggest UDEQ consider the following additional sections:
  - If UDEQ intends to require compensation for impacts as special conditions, we suggest providing some backing and general guidelines for that in the regulations.
  - We suggest a section to address Utah's authority to incorporate re-opener provisions in certification conditions for long-term operations (e.g. FERC licenses for dams).
- 6.1(1)(b): We suggest replacing "and" with "or" in, "exceeds water quality criteria, either narrative ~~and~~ or numeric, in R317-2-7;"
- 6.1: We suggest an additional consideration of consistency with other appropriate requirements of state law, including consideration of state species of concern.
- 6.4: If not addressed elsewhere, we recommend providing more details for how enforcement of 401 certifications may occur and what the penalties may be.